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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 58

BLANCHE DICK
Petitioner

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION,
Respondent

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The petitioner's statement of the case is inaccurate. It wholly omits certain very material facts which are undisputed. Hence this supplementary statement is submitted.

The petitioner, Blanche Dick, was beneficiary of two life insurance policies issued by the respondent to her husband, William Dick. Both policies provided for double indemnity benefits in the event of accidental death. The single indemnity benefits were paid after commencement of suit, leaving the only issue for trial the right to recover the double indemnity benefits (R. 40, 48-49).

Petitioner alleged and respondent denied that the insured's death "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means", as limited and defined in the double indemnity provisions of both policies. As an affirmative defense, respondent alleged that the death of the insured resulted from suicide or self-destruction, making applicable the policy provisions that double indemnity benefits were not payable if death resulted from "self-destruction, whether sane or insane" (R. 5-6).

The action was tried to a jury resulting in a verdict in favor of petitioner for $7,500.00 (R. 49).

The insured's death occurred on January 20, 1955. His body was discovered by his wife when she entered the barn to call him. Receiving no answer, she entered the little silage shed between the barn and silo (Pl. Ex. 7; R. 11). It was then between 10:30 and 11:00 a.m. She saw her husband in the shed, lying on his back with his feet facing the south or outer door of the silo. She observed the wound on his head and knew he was dead. His double-barreled shotgun was lying near the body. He was dressed in blue overalls and jacket and had gloves on (R. 8, 9, 10).

She heard no shots from the shotgun. She testified her husband was experienced in the use of firearms, and had hunted every fall since 1926 for pheasants, deer, ducks and geese (R. 10).

Mrs. Dick called George Dick, a brother, who went to the silo shed and looked in. The deceased's left foot was on the floor and his right cocked against a 2 x 4 east of the south door. His forehead and eyes were completely gone. Plaintiff's Exhibit 11 (R. 15) is a picture posed by George Dick showing the location of the deceased's body

in the position it was lying when he saw it. The gun, which was a double-barrel 12-gauge shotgun with two triggers, one in back of the other, was lying about 3 feet from the body with the butt near the feet and the barrel alongside the head. The body was clothed in a blue bib overall, yellow flannel gloves, and work jacket with a zipper (R. 13, 14).

He found a concentration of shot pellets in the northwest corner of the shed and shot marks in the southeast corner on the east wall, south of the door, 3 or 4 feet from the floor. Pieces of human flesh were spattered about, mostly on the south door and above on the roof (R. 13).

The decedent's gun was usually kept in the barn. He had gone hunting every fall since 1926 for pheasants, deer, ducks and geese, and on these trips used the shotgun found near the body. He was experienced and careful in the use of firearms (R. 9, 10, 14).

Mr. Dick was very seldom a moody man. If he had anything on his chest, he would get it off and forget about it. These moody intervals were not frequent (R. 13, 14).

Mr. Noice, the County Sheriff, arrived at the farm about 11:00 a.m. He observed what he believed to be powder burns about an inch above the decedent's left ear. The gun was about 18 inches from the body with the stock toward the feet and the barrel along the body. The end of the muzzle was at about the chest. He took possession of the gun. It was a 12-gauge double-barrel Stevens gun with two triggers, placed one ahead of the other. The front trigger fires the right barrel and the rear trigger the left barrel. It weighed about 7 pounds. There is a safety device located on top of the stock behind the barrels and behind the device which breaks the gun. Before the gun can be

fired, the safety device must be released by pushing the button ahead. It would not fire otherwise (R. 18, 19).

While in the shed, the sheriff picked up the gun. It was dry and clean. He broke it and found two discharged 12-gauge shells in the chambers, which he removed. He observed a screw driver 8 to 10 inches long lying to the left of the gun barrel and about 8 to 10 inches from it (R. 20).

The sheriff made numerous tests with the gun to see if it would fire by jarring, pounding, or dropping it. All these tests were made with the gun off safe. In no instance did the triggers fire during these tests. They were made in the basement of the Courthouse. The gun was held with the muzzle pointing toward the ground and dropped a distance of about 10 inches to a board. This test was made about 10 times. The gun was then held with the butt about 10 inches from the floor and dropped to a board. This test was made 8 or 10 times. Next, the gun was placed in normal shooting position against the right shoulder with the barrel in the sheriff's left hand and the stock in his right hand. He struck it against the board 3 or 4 times. The butt was placed on the floor and the barrel allowed to fall on a board (R. 19, 20). Tests of the trigger pull were also made by the sheriff with a spring scale. It required approximately 7 pounds pull to fire the triggers. This test was made twice with both triggers, with the same result (R. 20).

After the body was removed to the funeral parlors, the sheriff observed for the first time a wound on the left side of the decedent's body. It was about 5 inches long, pear-shaped and grazed the ribs. Defendant's Exhibit 17 (R. 25), shows the wound. The photograph was taken about two hours after the body was brought to the funeral home (R. 21).

Dr. Veitch, the County Coroner, accompanied the sheriff to the Dick farm and made an investigation as part of his official duties. He stated that the decedent's forehead and eyes were gone. The bone and tissue in front of the ears were gone, with the brain contents in plain sight. There was some red meat tissue or blood spatter on the south door and also on the north wall, mostly on the upper half with the area of greatest concentration on the south door (R. 23, 24).

About an hour and a half after he was at the farm, he examined the body in the funeral home when the clothing had been removed. He found another wound in the chest. It was a furrow type on the left lateral chest wall, extending about 5½ inches in length. The top was about 2½ to 3 inches below the left nipple with the greatest width about 2½ inches (R. 24).

He testified the wound to the head caused immediate death. The chest wound did not do so. It would have eventually caused death within one day to two weeks. The chest wound was terrifically painful, but did not result in loss of consciousness. Its chief consequence would be pain. The deceased would have the capacity to pull the trigger of a shotgun after receiving the chest wound (R. 26).

When he examined the body in the funeral parlor, the doctor observed definite powder marks on the skin of the left forehead in front of the ear. There was a high concentration of a powder burn extending a half inch to an inch (R. 30).

As a physician, he attended the deceased 8 times between September 13, 1954 and December 30, 1954. Mr. Dick had a mild to moderate non-specific prostatitis, was

tired and felt pepless. He was put on sulpha therapy and received hormone injections each time after the first visit to the doctor. His illness did not prevent him from doing farm work. He would do it in spite of the misery he was having (R. 30, 31).

Dr. Veitch completed and signed Defendant's Exhibit 9 (R. 35), in connection with petitioner's claim for benefits under the policies. It shows death was due to "Suicide".

A firearms expert testified that when fired at close range, the burning powders and gases from guns leave marks called powder burns. He found powder burns on the fabric of the decedent's outer jacket. These marks were at the holes toward the front of the jacket, and there were none at the hole to the rear. These burns were about an inch on each side of the top and bottom of the front hole. The direction of the shot charge, according to the holes present in the jacket, was front to rear (R. 32).

An inquest on the death of William Dick was held by a coroner's jury on January 28, 1955. A verdict of "suicide" was returned. The verdict was annulled and set aside by order of the District Court of Ransom County, North Dakota, on May 19, 1955, for want of compliance with statutory provisions regarding the time and manner of impanelling and administering the oath to the jury (R. 34).

ARGUMENT

I.

The Court of Appeals followed state law.

The assertion is made in petitioner's brief that the Circuit Court's decision is in conflict with all relevant decisions of the North Dakota Supreme Court. To the contrary, the Court of Appeals expressly recognized its obligation to follow the substantive law of the state (R. 57-58). Petitioner's quarrel is with the result reached by the court after analyzing the evidence rather than its failure to apply the North Dakota law to the evidence.

The North Dakota rule is well established. It is clearly set forth in *Svihovec v. Woodmen Acc. Co.* (1939), 69 N. D. 259, 285 N. W. 447, where the court said:

> "The rule announced by this court in Stevens et al. v. Continental Casualty Co., 12 N. D. 463, 97 N. W. 862, gave to the presumption in favor of accidental death the weight of affirmative evidence. It was there held that proof of death by gunshot wound, aided by this presumption, was sufficient to establish a prima facie case of accidental death, and that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury. Defendant contends for a modification of this rule and its brief presents a scholarly and persuasive argument in support of that contention. Despite the logic of defendant's argument and the weight of the authority presented to support it, we feel we must adhere to the rule above set forth. That rule was affirmed by this court in Clemens et al. v. Royal Neighbors of America, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111, and it follows as a fair construction

of sections 7934 and 7936, Compiled Laws of North Dakota, 1913."

285 N. W. 449.

This is the last expression of our court and two of the previous decisions are cited in support of the holding.

It is significant that in both the *Clemens* and the *Svihovec* cases the plaintiff did not prevail. In *Clemens* the trial court directed a verdict for the defendant insurance company which was affirmed on appeal. The court said:

> "Has the presumption of law that death was not caused by suicide been overcome by the defendant, as a matter of law? If so, the direction of a verdict was proper. If reasonable men, viewing these undisputed facts, might differ in their conclusions as to whether the deceased committed suicide, then the facts should have been submitted to the jury. If there is no evidence in the record that can be said to be inconsistent with the conclusion of death by suicide, then the question was properly one for the court to direct the jury to find a verdict for the defendant. We think the facts all point to death by suicide, and are inconsistent with any other reasonable theory."
>
> 103 N. W. 404.

In *Svihovec* the judgment entered upon a jury verdict for the plaintiff was reversed and the case dismissed. The court found that the facts and circumstances surrounding the insured's death could not be reconciled with any *theory* of accidental or nonintentional injury.

> "The only theory of accidental death presented to the court is that the shot or shots which killed these men were fired by some hunter in the neighborhood. For us to assume, however, that a stray bullet or bullets, following a random course across the countryside, could set in motion a chain of circumstances so purposeful in implication, would take us away from

the field of rational inferences based on human experience and into that of speculation upon fantastic possibility. *We can conceive of no theory of accidental or nonintentional injury consistent with the proof.* We determine, therefore, that it is shown as a matter of law, that the death of the insured was due to an intentional act and was not accidental; that under the exceptions of the policy sued upon, plaintiff's right to recover is thereby defeated." (Italics supplied.)

285 N. W. 449-450.

The Court of Appeals in the instant case, after studying and outlining the evidence, expressly and aptly referred to the *Svihovec* case and applied the rule there stated.

"The Supreme Court of North Dakota has held that proof of death by gunshot wound plus the presumption of accidental death makes a prima facie case that death was accidental, and 'that a verdict founded upon such proof and presumption would not be set aside unless the facts and circumstances surrounding the death could not be reconciled with any reasonable theory of accidental or nonintentional injury.' Svihovec v. Woodmen Accident Co., 69 N. D. 259, 285 N. W. 447, 449.

"If the facts and circumstances surrounding the death of the insured can be reconciled with any reasonable theory of accidental injury the judgment appealed from should be affirmed, but if they cannot the judgment should be reversed" (R. 61-62).

II.

The undisputed facts are consistent only with suicide.

The evidence clearly establishes certain undisputed facts which are wholly inconsistent with any *reasonable* theory of accidental death. As Circuit Judge Sanborn clearly points out, the plaintiff is not entitled to the benefit of inferences

which are unreasonable or which are opposed to the undisputed physical facts (R. 58).

The evidence definitely establishes these facts:

1. William Dick was an experienced hunter. He had hunted practically every fall since 1926 for pheasants, ducks, geese and deer. He was thoroughly familiar with shotguns and their operation and was careful in the handling of firearms. The gun which caused his death was the only one he owned.

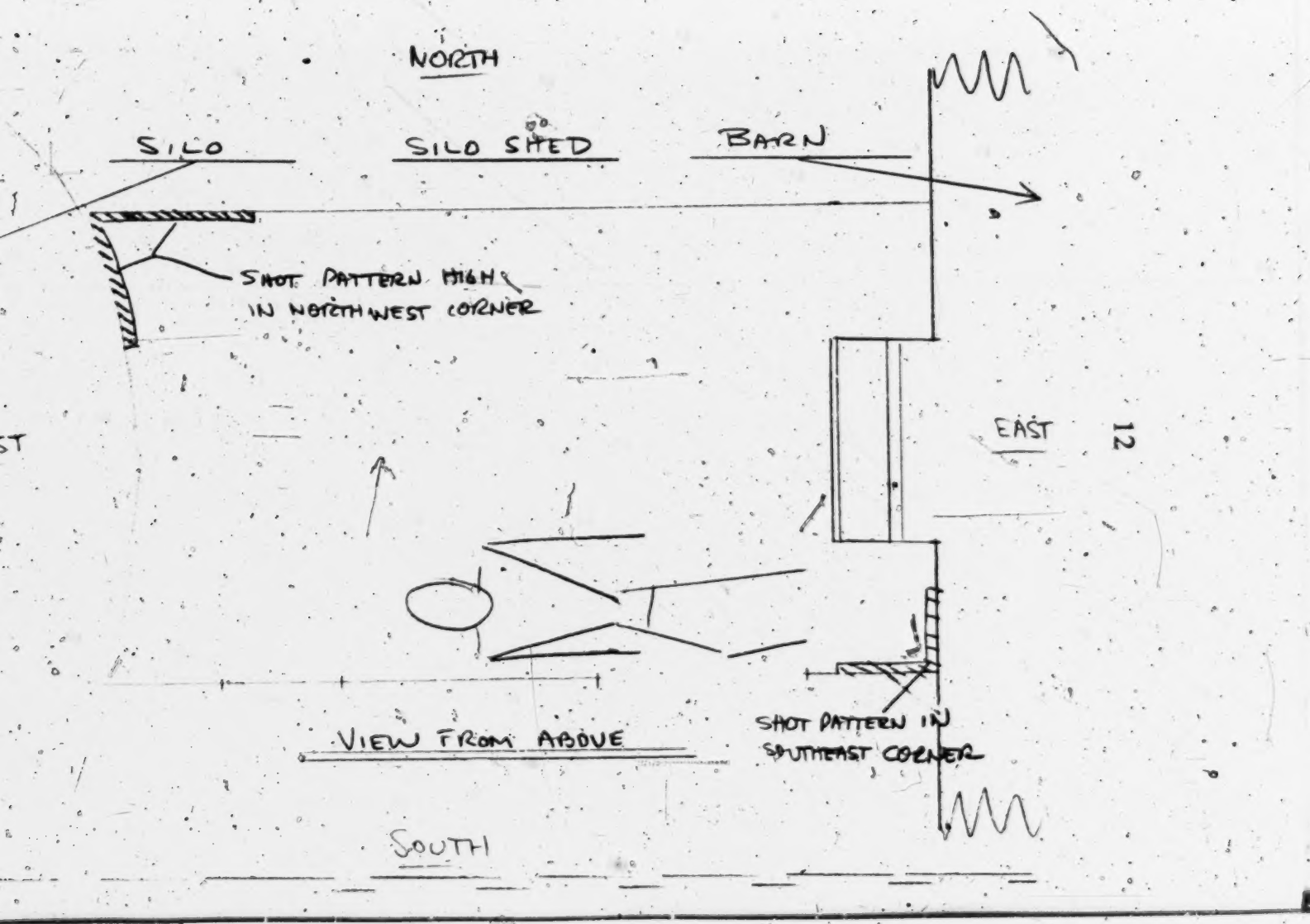
2. After shells are inserted in the chambers and the gun breech closed, the weapon automatically goes on "safe". It could not be discharged without manually pushing the safety button forward from safe position.

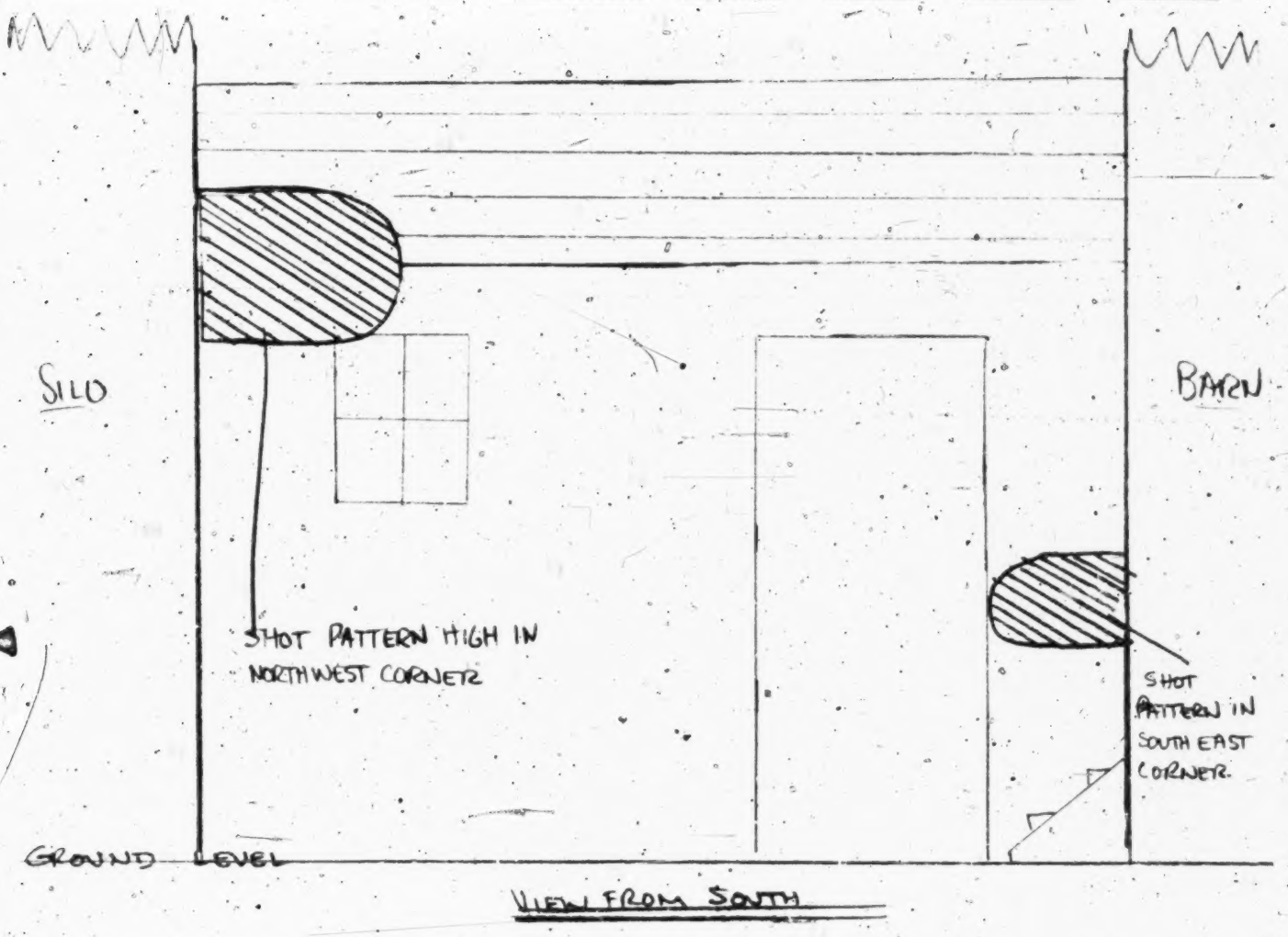
3. Tests made by the sheriff immediately afterwards show that it required 6 to 7 pounds pressure on each trigger to fire the gun; that with the gun "off safe", it could not be fired by dropping, jarring or striking it forcibly against an object. It was in good operating condition. When picked up in the shed, the gun was dry and clean.

4. Mr. Dick was found on his back in the silage shed with his feet near the door leading from the shed to the feed lot. Two discharged 12-gauge shells were in the chambers, indicating two shots had been fired in the shed. His shotgun lay alongside to the left and parallel with his body. A screw driver 8 to 10 inches long was found to the left of the gun.

5. There were shot pellets in the northwest corner and on the southeast corner of the shed. The latter were 3 or 4 feet from the floor. Tissue from Mr. Dick's head was in the southeast corner. There was some meat tissue and blood spatter on the south door and also on the north wall.

The following rough diagrams prepared by us illustrate graphically the location of the body and the shot pattern.


NORTH
SILO
SILO SHED
BARN
SHOT PATTERN HIGH IN NORTHWEST CORNER
EAST
12
VIEW FROM ABOVE
SHOT PATTERN IN SOUTHEAST CORNER
SOUTH



VIEW FROM SOUTH

6. Two wounds were found on the body, one in the chest and one on the forehead. The chest wound was mortal but not immediately fatal. It was terribly painful but would not have caused loss of consciousness. After the chest wound, the insured could still have fired the gun. The wound to the head caused instant death.

7. Both shots left powder burns. Powder marks were found on the front of the outer jacket worn by the insured around the hole where the shot entered. The direction of the shot charge is from front to rear. Definite powder marks were also found on the skin of the left forehead in front of the left ear; that "they extended a half inch to an inch, quite a high concentration of a powder burn." Both shots were fired at extremely close range.

8. The clothing worn by Mr. Dick was received in evidence. Examination of the underwear shows that blood from the chest wound traced two courses—one down from the wound toward the crotch—the other around the back of the underwear.

9. The insured had been treated by his physician 8 times between September 13, 1954 and December 30, 1954, for a form of mild to moderate non-specific prostatitis. He complained of being tired and pepless. The doctor administered sulpha therapy or hormones by injection. Death occurred January 20, 1955. The proof of death signed by the physician states that death was due to "Suicide".

In the language of the decision in the *Svihovec* case, can the facts and circumstances surrounding the death of the insured be reconciled with any reasonable theory of accidental death. It is earnestly submitted that they cannot.

The insured had used his gun for hunting since 1926. He was a husky, strong man, experienced and careful in the use of firearms. There is a total dearth of any evidence pointing to any legitimate use of the gun. The testimony is vague as to where the gun was kept, except the wife's statement that it was usually kept somewhere in the barn. Realizing the necessity for some proof justifying the use of the gun, evidence was received, over objection, that within a year previous dogs had killed or chewed up sheep on the farm. There is no testimony that the dogs were in the neighborhood within such a close interval of time as would indicate the necessity for protecting the sheep. Mrs. Dick, who was alone on the farm, did not hear any noise from any dog pack. She did not testify to any indication of a disturbance among the livestock on the farm when she went out to get her husband. There was no testimony as to the presence of any wild animals or game in the vicinity at the time.

Testimony was also received, over objection, that on November 8, 1954, the insured's gun might have accidentally discharged while he was hunting. The witness testified that he did not know whether the deceased had pulled the trigger or not. On cross examination the insured's brother stated "He might have thought he had the gun off safe when he didn't, or he may have pulled the trigger and not be aware of it" (R. 36).

This evidence was apparently offered for the purpose of showing that on January 20, 1955, the gun *might* have accidentally discharged. The testimony of the sheriff as to the efforts which he made to discharge the weapon shows that whatever may have been the gun's condition previously, it was in good operating condition immediately after Mr. Dick's death.

No credible evidence or evidence from which any reasonable inference could be drawn, was offered indicating that the insured, while in the silo shed, had accidentally discharged the gun as the result of falling or stumbling. On the contrary, the evidence affirmatively shows that there was only a sprinkle of silage on the floor and some on the steps. There were no bare spots or marks to indicate any slipping or falling. No testimony was offered as to any nails, hooks or projections in the shed which might have accidentally discharged the gun. No explanation is offered as to why death occurred in the shed, if the insured intended to shoot some animal, if any were present in the vicinity.

The fact that shot pellets, blood and tissue spatter were found midway on the wall in the southeast corner and high in the northwest corner of the shed indicates quite clearly that both barrels of the gun were fired. It also demonstrates quite clearly that the gun was discharged while the insured was in a standing position, stooping over, with the gun pointed upward when he inflicted the chest wound; and that he was stooped over or kneeling with the long axis of the shotgun more nearly horizontal when the fatal head wound was inflicted. These physical facts offered as part of the plaintiff's proof quite definitely rule out an accidental discharge occasioned by or resulting from the insured's stumbling or falling while entering or in the shed. The fact that the shot concentration was found in different corners of the building at approximately a 180 degree angle and at differing heights from the floor would seem to exclude any possibility that there could have been an accidental discharge of both barrels. It is submitted that plaintiff's own evidence wholly failed to establish the acci-

dental discharge of the gun. In fact, it is inconsistent with any theory of death except that of self-destruction, and a verdict could have been directed for the defendant at the close of testimony were it not for the artificial aid given the plaintiff by the presumption against suicide.

When examined by the sheriff in the shed the gun was dry. When he broke it, he found two discharged shells, which he removed. The screwdriver which he found lying to the left of the gun barrel could have been used by the insured to fire the triggers.

There is no question but that each shot charge struck the insured in a different area of the body. There was a furrow type wound in the left lateral chest wall, below the nipple. Another charge from the gun had blown off most of the decedent's forehead and the eyes were gone. Dr. Veitch testified that the chest wound, while painful, did not result in loss of consciousness, but that the deceased would have the capacity to pull the trigger after receiving this wound. The blood stains present on the deceased's underwear, running from the wound down toward the crotch, indicate conclusively that Mr. Dick was in an upright position—either standing or kneeling *after* the chest wound and before the head wound. The wound to the head, of course, caused immediate death. The sequence of the shots is therefore clear. The chest wound was received first and thereafter the head injury.

The gun was a 12-gauge, double-barrel Stevens. It was equipped with two triggers placed one ahead of the other. The front trigger fired the right barrel and the rear trigger the left barrel. When the gun is broken and shells inserted and the breech closed, it automatically goes on safe. Before it can be fired a safety device on the top of the stock must

be released by pushing a button forward. Until this is done neither trigger can be fired.

Immediately after taking the gun into his possession, the sheriff made numerous tests to determine whether the gun could be accidentally fired. It is clear from the undisputed evidence that the gun was in a good, safe mechanical operating condition and could not be discharged without the intervention of a human agent. In the face of testimony that the insured was experienced and careful in the use of firearms, it is inconceivable that he would carry the gun into the shed in a position to fire upon pulling the triggers. Even if he did so, the tests made by the sheriff, and the strong trigger pull would seem to rule out accidental discharge due to falling or stumbling, or some other cause. The theory may be advanced by the plaintiff that the insured was dragging the gun by the barrel and bumping the stock along the ground, thereby accidentally discharging it. It is inconsistent with the known fact that the insured was a husky man, and any hunter who had hunted for nearly 30 years would not handle a gun in this fashion. Even though the first shot were conceded to be accidental, no theory of accident can explain the second shot.

A more reasonable hypothesis is that the insured placed the shells in the chamber, deliberately took the gun off safe, and then discharged the first barrel, resting the butt on the ground and placing the end of the barrel against his left chest in the vicinity of the heart. When this shot charge was not fatal, he then placed the gun with the muzzle against his head, resulting in instant death.

Both the sheriff and the doctor testified as to the presence of powder burns on the skin of the left forehead in front of the ear. Dr. Veitch said there was a concentration of a powder burn. A firearms expert called by the

defendant found powder burns on the fabric at the front of the decedent's outer jacket and none at the hole to the rear of the jacket through which the pellets had gone. He placed the direction of the shot charge from front to rear. These powder burns indicated that the muzzle of the gun was held close to the chest and also to the head when the explosions occurred. Such a coincidence could not occur through accident, but only as the result of deliberate design. To attribute the presence of these powder burns to accident would be fantastic. In the case of *New York Life Ins. Co. v. Trimble* (C. C. A. 5th), 69 F. 2d 849; Cert. Denied 293 U. S. 561, 79 L. Ed. 661, 55 S. C. 72, the evidence showed that there were powder burns in and immediately around the wound where the bullet entered, indicating that the weapon was held against the right temple. The court there said:

> "In a case where the insured holds a pistol against his temple and shoots himself with it, the plaintiff who relies on the theory of accident in a suit on the policy, is indeed under a heavy burden."
>
> 69 F. 2d 849, 851.

The hypothesis of accidental death is wholly inconsistent with the facts established by the defendant through uncontroverted evidence. The only testimony offered by the plaintiff came from close relatives of the deceased, his wife, daughter, brothers and nephew. It established nothing much more than that some of the usual motives which exist where suicide is claimed are not present here. It is pointed out by the petitioner that the insured was usually a happy, jolly man, and tended to look on the light side of things. There was, however, testimony on direct examination by the decedent's brother that he was moody at times.

As the witness put it, "He was very seldom a moody man". The witness also testified, "If he had anything on his chest, he would get it off and forget about it" (R. 14).

The decedent had consulted Dr. Veitch professionally 8 times for his prostate trouble. Mrs. Dick was aware that her husband was consulting a doctor but did her best to minimize the seriousness of it by referring to it as a "Check up". She knew of only two trips, when in fact there were 8, tending to indicate that her husband preferred not to disclose the other treatments. It is a reasonable inference that he regarded his illness seriously and that it was a cause of concern to him.

It is a matter of common knowledge that persons who have abundant reasons to be satisfied with their lot in life do commit suicide. It was not necessary for the defendant to prove a motive in this case for suicide, although evidence was offered of the insured's prior ill health.

> "A motive for suicide is helpful to the defense but is not essential. Aetna Life Ins. Co. v. Tooley, supra; Burkett v. New York Life Ins. Co. (C. C. A.) 56 F. 2d 105. This is so because in this life *men who have no apparent motive for it do commit suicide.* Perhaps always in the case of a sane person who commits suicide there is a motive; but in many cases the motive is not, and possibly could not be proven. And so here we leave out of consideration any question of motive for suicide, and assume there was none. In our opinion the circumstances in this case are all consistent with the theory of suicide, and are all inconsistent with any but a *fanciful* theory of accident." (Italics supplied.)
>
> *New York Life Ins. Co. v. Trimble* (C. C. A. 5th), 69 F. 2d 849, 851.

> "The fact that powder burns were in the wound, and extended only slightly beyond the edge of it, indicat-

> ed, according to the uncontradicted testimony, that the pistol was held against the temple, or very close to it. This evidence certainly is consistent with the theory of suicide. But it is said that Tooley had no motive to take his own life, because he was successful in business, had no financial or domestic troubles, and was interested in providing a place in the business world for his sons. However, it is not to be denied that successful businessmen, living in pleasant surroundings, do commit suicide. Ill health and a depressed or disordered mental condition frequently furnish the motive for suicide, even among the prosperous and those who have every reason to be satisfied with their lot in life. *There is not a circumstance tending to show* that in this case death was the result of accident." (Italics supplied.)
>
> *Aetna Life Ins. Co. v. Tooley* (C. C. A. 5th), 16 F. 2d 243, 244

Perhaps the most conclusive fact in the case which definitely eliminates any theory of accident is the uncontroverted evidence that two shells were exploded in the little shed. Assuming for the sake of argument that the first shot might have been accidental, it is inconceivable on any rational theory that both triggers could have been accidentally discharged. It is straining one's credulity to conjecture that both shots would have inflicted injury to the decedent's body unless there was deliberate design on the part of the insured to take his own life.

The appellate court upon this record reached the conclusion that the judgment could not stand.

> "One can believe that even an experienced hunter might accidentally shoot himself once, but the asserted theory that he could accidentally shoot himself first with one barrel and then with the other stretches credulity beyond the breaking point.
>
> * * * * *

> "Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury. Compare, Burkett v. New York Life Ins. Co., 5 Cir., 56 F. 2d 105, and Svihovec v. Woodmen Accident Co., supra" (R. 61-62).

To paraphrase what is said in the *Svihovec* case, any inference of accidental death from the known facts would "take us away from the field of rational inferences based on human experience and into that of speculation upon *fantastic* possibility".

CONCLUSION

The ruling by the District Court or the Court of Appeals where a review of the facts is sought by a motion for directed verdict made at the close of all the evidence presents a question of law. No denial of trial by jury is involved where the court exercises its inherent right to pass upon the sufficiency of the evidence. The Court of Appeals followed the applicable North Dakota decisions in cases of this character. Its determination that under the evidence no question of fact for the jury was presented is supported by the uncontroverted evidence. No other conclusion is possible, and its decision should be sustained.

Respectfully submitted,

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